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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-499

WARDEN, State Prison of Southern Michigan at Jackson,

Petitioner,

vs.

HARRISON BERRIER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

QUESTIONS PRESENTED

1. Did the trial court's jury instructions on the issue of self defense, when viewed within the context of the overall charge and the trial as a whole, impermissibly shift the burden of proof onto Respondent thereby so in-

fecting the entire trial that the resulting conviction violates due process?

2. Does Michigan have a contemporaneous objection rule when there has been an omission of an essential element in the court's instructions to the jury?

STATEMENT OF THE CASE

The Petitioner's statement of the case is adequate.

REASONS FOR DENYING THE WRIT

I.

The Trial Court's Jury Instructions On The Issue Of Self Defense, When Viewed Within The Context Of The Overall Charge And The Trial As A Whole, Impermissibly Shifted The Burden Of Proof Onto Respondent Thereby So Infecting The Trial That The Resulting Conviction Violates Due Process Of Law.

The majority decision of the Court of Appeals for the Sixth Circuit adequately and correctly concluded that the instructions given by the trial court improperly shifted the burden of proof (Appendix C, 13a-30a).

The Petitioner is in error when he concludes, "at only one point in the instructions did the court state that any burden was on the defense, . . . " (Petitioner's brief, 9).

As the circuit court majority recognized, the instruction was not only given twice prior to the jury commencing deliberation, but was repeated in response to the jury asking the court to repeat the three elements necessary to be present for self defense (Appendix C, 17a-20a).

Therefore, it is clear that the instructions when read in their entirety unconstitutionally shifted the burden of proof and denied Respondent Due Process of Law.

II.

Michigan Does Not Have A Contemporaneous Objection Rule When There Has Been An Omission Of An Essential Element In The Court's Instruction To The Jury.

Petitioner suggests that by General Court Rule and by Statute Michigan requires an objection to instructions to the jury to preserve the issue for review. However, Petitioner ignores the case law of Michigan that allows review of instructional error where there has been an omission of an essential element in the absence of a contemporaneous objection. See, e.g. cases cited by the majority (Appendix C, 28a).

It is important to note that Judge Edwards, the author of the majority opinion, was a justice of the Michigan Supreme Court when the court reiterated the above rule. *People* v *Dorrikas*, 354 Mich 303, 92 NW2d 305 (1957).

In addition Judge Edwards also authored the principal Michigan case discussing self defense as an element that must be proved beyond a reasonable doubt by the state. *People* v *Stallworth*, 364 Mich 528, 111 NW2d 742 (1961).

Since Michigan does not have a contemporaneous objection rule where there has been an omission of an element in the instructions to the jury, it is clear that the decision of the Court of Appeals for the Sixth Circuit is correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Dated: October 11, 1978